

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

GREGG FREISHTAT, as)	
Shareholders' Representative,)	
)	
Plaintiff,)	
)	
v.)	Civil Action No. 07 CV 6838 (JGK)
)	
LIVEPERSON, INC.,)	
)	
Defendant.)	
_____)	

**PETITION FOR APPOINTMENT OF ACCOUNTING REFEREE
AND MEMORANDUM IN SUPPORT THEREOF**

Plaintiff, Gregg Freishtat, as Shareholders' Representative ("Freishtat"), through his undersigned counsel, and pursuant to the terms of the parties' Agreement and Plan of Merger (the "Merger Agreement"), hereby files this Petition for the Appointment of Accounting Referee and the Memorandum in Support Thereof. For the reasons described more fully in the supporting memorandum set forth below, Freishtat respectfully requests that this Court appoint a firm of regionally or nationally recognized certified public accountants to serve as an Accounting Referee for the purpose of making non-binding determinations regarding the parties' dispute relating to the Earn-Out Payment.

MEMORANDUM IN SUPPORT

On or about June 22, 2006, Defendant LivePerson, Inc. ("LivePerson"), SOHO Acquisition Corp., Proficient Systems, Inc. ("Proficient"), and Freishtat, entered into the Merger Agreement, relevant portions of which were attached to the Complaint in this matter as Exhibit

“A.”¹ As part of the consideration for the Merger Agreement, the Shareholders and LivePerson agreed to an Earn-Out Payment which was to be calculated based on certain revenue from specified customers and prospective customers (identified in the annexes to the Merger Agreement as Company Existing Customers, Company Business Development Customers, and Company Pipeline Customers) that was recognized or booked, according to GAAP, by LivePerson in March 2007.

As required by the Merger Agreement, LivePerson delivered the Earn-Out Notice, dated May 10, 2007, to the Shareholders’ Representative.² The Earn-Out Notice set forth the Earn-Out Payment amount determined by LivePerson. The Shareholders’ Representative objected to the Earn-Out Payment amount as determined by LivePerson, elected to dispute LivePerson’s determination of the Earn-Out Payment amount, and timely delivered an Earn-Out Dispute Notice, dated July 9, 2007, to LivePerson pursuant to the terms of the Merger Agreement.³ To date, the Shareholders’ Representative and LivePerson have been unable to resolve the dispute.

Section 2.04(b)(v) of the Merger Agreement provides, in pertinent part, as follows:

If the Shareholders’ Representative and [LivePerson] are unable to resolve the dispute within fifteen (15) Business Days of delivery of the Earn-Out Dispute Notice to [LivePerson], the dispute shall be submitted to a firm of regionally or nationally recognized certified public accountants, or other party acceptable to both parties (an “**Accounting Referee**”). If the parties cannot agree upon the Accounting Referee within ten (10) calendar days of the foregoing fifteen (15) day period, each party shall have the right to petition courts within the State of New York, County of New York or the United States District Court for the Southern District of New York to so appoint an Accounting Referee.

¹ Capitalized terms not otherwise defined in this Petition shall have the meaning ascribed to such terms in the Merger Agreement.

² The Earn-Out Notice is attached as Exhibit “B” to the Complaint.

³ The Earn-Out Dispute Notice is attached as Exhibit “K” to the Complaint.

As of the date of this Petition, the parties have not agreed on “a firm of regionally or nationally recognized certified public accountants, or other party acceptable to both parties,” to serve as an Accounting Referee to which the Shareholders can submit the dispute as required by Section 2.04(b)(v) of the Merger Agreement. Consequently, pursuant to the terms of the Merger Agreement, the Shareholders’ Representative filed the above Petition with this Court, seeking the appointment of an Accounting Referee.

WHEREFORE, for all of the foregoing reasons, Mr. Freishtat, as Shareholders’ Representative, respectfully requests that this Court enter an Order appointing a firm of regionally or nationally recognized certified public accountants to serve as an Accounting Referee pursuant to Section 2.04(b)(v) of the Merger Agreement.

Respectfully submitted, this 3rd day of December, 2007.

DLA PIPER US LLP

/s/ Arthur D. Brannan

Arthur D. Brannan, Esq.

(admitted *pro hac vice*)

Anthony D. Lehman, Esq.

(admitted *pro hac vice*)

1201 West Peachtree Street, Suite 2800

Atlanta, Georgia 30309-3450

Telephone: (404) 736-7800

Facsimile: (404) 682-7800

arthur.brannan@dlapiper.com

anthony.lehman@dlapiper.com

Of Counsel:

Christopher G. Campbell (CC 3940)

1251 Avenue of the Americas, 27th Floor

New York, New York 10020-1104

Telephone: (212) 335-4500

Facsimile: (212) 335-4501

1201 West Peachtree Street
Suite 2800
Atlanta, Georgia 30309-3450
Telephone: (404) 736-7800
Facsimile: (404) 682-7800
christopher.campbell@dlapiper.com

*Attorneys for Plaintiff,
Gregg Freishtat, as Shareholders' Representative*

CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2007, I electronically filed a correct copy of the foregoing PETITION FOR APPOINTMENT OF ACCOUNTING REFEREE AND MEMORANDUM IN SUPPORT THEREOF with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Douglas Curtis
Brian B. Margolis
Justina L. Geraci
WILMER CUTLER PICKERING
HALE AND DORR LLP
399 Park Avenue
New York, NY 10022
douglas.curtis@wilmerhale.com

/s/ Arthur D. Brannan
Arthur D. Brannan

4399787